

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

*Orig. off. sent by
mailing*

77-1229

To be argued by
BARRY E. SCHULMAN

B

United States Court of Appeals

BS

FOR THE SECOND CIRCUIT

Docket No. 77-1229

UNITED STATES OF AMERICA,

Appellee,

—against—

VINCENT W. ALBANO,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID TRAGER,
United States Attorney,
Eastern District of New York

ALVIN SCHALL,
BARRY E. SCHULMAN,
Assistant United States Attorneys,
Of Counsel.

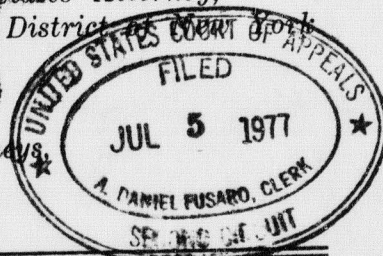


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	2
ARGUMENT:	
Appellant was properly sentenced	6
CONCLUSION	10

TABLE OF AUTHORITIES

Cases:

<i>Counts v. United States</i> , 527 F.2d 542 (2d Cir. 1975), cert. denied, 425 U.S. 923 (1976)	6
<i>McGee v. United States</i> , 462 F.2d 243 (2d Cir. 1972)	6
<i>United States v. Driscoll</i> , 496 F.2d 252 (2d Cir. 1974)	8
<i>United States v. Needles</i> , 472 F.2d 652 (2d Cir. 1973)	8
<i>United States v. Robin</i> , 545 F.2d 775 (2d Cir. 1976), rehearing en banc denied, 553 F.2d 8 (1977) 6, 7, 8, 9	
<i>United States v. Schwarz</i> , 500 F.2d 1350 (2d Cir. 1974)	7
<i>United States v. Seijo</i> , 537 F.2d 694 (2d Cir. 1976), cert. denied, — U.S. — (1977)	6
<i>United States v. Wolfson</i> , — F.2d —, Slip Op. 4021 (2d Cir. June 3, 1977)	8

Statutes:

Title 26, United States Code, Section 7201	1, 3, 7
Title 26, United States Code, Section 7206(1) ...	1, 3, 7

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1229

UNITED STATES OF AMERICA,

Appellee,

—against—

VINCENT W. ALBANO,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Vincent W. Albano appeals from a judgment of the United States District Court for the Eastern District of New York (Thomas C. Platt, J.) entered on March 31, 1977, convicting him, following his plea of guilty to three counts of a ten count indictment, of violations of the federal income tax laws.

Appellant was convicted on Counts Five, Eight and Ten of Indictment 76 Cr. 481. Count Five alleged that appellant wilfully and knowingly attempted to evade a large part of the income tax due and owing by him and his wife to the government for the calendar year 1972, in violation of 26 U.S.C. § 7201. Counts Eight and Ten charged that appellant did wilfully and knowingly make and subscribe for the years 1973 and 1974 federal income tax returns which he knew to be false as to material matters, in violation of 26 U.S.C. § 7206(1).

On Count Five, appellant was sentenced to a term of imprisonment of three years and was fined \$10,000. On each of Counts Eight and Ten, appellant was sentenced to a term of imprisonment of three years, execution of said sentences being suspended, was placed on probation for a period of five years, and was fined \$5,000. All three sentences were ordered to run consecutively, with the fines to be computed cumulatively. The fines imposed thus total \$20,000 for three counts. Appellant is presently in custody serving his sentence.

The sole issue presented on appeal is whether Judge Platt relied on misinformation when sentencing appellant and whether he should have recused himself and had appellant's case transferred to another judge for sentencing.

Statement of Facts

Appellant, who was formerly a narcotics detective in the New York City Police Department, became the subject of investigation during a wide-ranging police corruption inquiry conducted by the United States Attorney's Office, the New York City Police Department, the Drug Enforcement Administration and the Internal Revenue Service. The investigation included inquiry into the theft of approximately 400 pounds of narcotics evidence from the New York City Police Department Property Clerk's Office and into other illegal activities on the part of present and former narcotics officers (A. 228).¹ This investigation disclosed that appellant had understated his taxable income for the years 1970 through 1974 in the amount of approximately One Hundred Ninety-Four Thousand Eight Hundred Eight Dollars and Seventy-One Cents (\$194,808.71). The final audit by the IRS

¹ References preceded by the letter "A" are to pages of appellant's appendix.

indicated that the appellant had a total additional tax, exclusive of interest and penalties, amounting to approximately \$77,449.17 for the above-mentioned years (A. 229).

As a result of this investigation, on July 28, 1976, an Eastern District grand jury returned a ten count indictment against appellant, charging him with five counts of income tax evasion and five counts of filing false statements.² Thereafter, on October 20, 1976 appellant appeared before United States District Judge Jack B. Weinstein and pleaded guilty to Count Five (income tax evasion, for 1972, in violation of 26 U.S.C. § 7201) and Counts Eight and Ten (filing of false statements in income tax return for the years 1973 and 1974, respectively, in violation of 26 U.S.C. § 7206(1)). After appellant entered his pleas of guilty and they were accepted by the court, the case was adjourned for the preparation of a presentence report.

The presentence report detailed the offenses to which appellant had pleaded guilty. It also contained, however, allegations that appellant had engaged in narcotics trafficking and had been a corrupt narcotics detective. Taking issue with these allegations, appellant moved, through his counsel, to have a new report prepared or, in the alterna-

² The following table reflects the amounts charged in the indictment under the evasion counts:

<i>Year</i>	<i>Taxable Income Reported</i>	<i>Taxes Paid</i>	<i>Approx. Actual Taxable Income</i>	<i>Approx. Taxes Due</i>
1970	\$ 5,318.00	\$ 870.00	\$19,054.14	\$ 4,218.04
1971	1,890.00	274.00	27,987.18	7,095.38
1972	2,790.00	416.00	23,819.81	5,602.34
1973	14,581.00	2,905.00	65,333.84	25,153.61
1974	11,499.00	2,150.00	94,691.34	41,994.80

tive, to have the offending portions stricken from the report which already had been submitted to the court (A. 1-13).

In response to appellant's motion, Judge Weinstein held an evidentiary hearing, at the conclusion of which he determined that there was insufficient evidence adduced at the hearing to support the allegation in the report that appellant had engaged in narcotics trafficking (A. 1-96). Thereupon, in response to appellant's request, Judge Weinstein agreed to recuse himself and to have the case transferred to another judge, who would have before him the full record in the case, including the findings of the court with respect to the allegations in the presentence report (A. 196-197). The judge refused, however, to seal the presentence report (A. 197). In disqualifying himself, Judge Weinstein noted:

I have made an invariable rule in view of the fact that this is a nine-judge court. If any lawyer or litigant feels that another judge can be fairer to him than I, let it go to another judge. I don't want to hold onto the case. I think every litigant in the court ought to have a sense that he's being treated fairly. If this defendant feels another judge can treat him fairly, I would like him to be treated fairly (A. 197).

In granting appellant's request, Judge Weinstein made it equally clear that he was permitting appellant only a peremptory challenge and that the court had no obligation to so act. Furthermore, the court stated that only one such challenge would be allowed:

The Court: The judges are trained to ignore charges and to decide the cases based on the evidence in the case.

The Government's made a charge through the Probation Department that this defendant dealt in narcotics. The Government was put to its proof and it came forward, the proof that the Court has

said is not credible. So I ignore that witness. They put the witness on, but you utterly destroyed him in a variety of ways, so his testimony is destroyed.

If you want another judge, you think another judge can do your client more good, I am delighted to have you have another judge, and I will grant your motion. We will send it to another judge. Then you can do what you want with that other judge.

I can tell you if another judge sent it to me I wouldn't grant it, because I think you can't go on challenging every judge in the entire court. *You are entitled to one challenge, and I will give it to you.* [Emphasis supplied] (A. 201 to 202).

Pursuant to Judge Weinstein's instructions, appellant's case was then placed back in the wheel for reassignment, and Judge Platt's name was drawn. On March 18, 1977, the parties appeared before Judge Platt (A. 213). Although Judge Platt had sat on the sentencing panel which had considered this presentence report, the court emphasized that it had no memory of the report or the recommendations of the panel, nor any preconceptions as to what sentence appellant would receive (A. 219-211). Furthermore, after declining to recuse himself, Judge Platt permitted appellant to voice objection to certain items in the presentence report and gave appellant the full benefit of the doubt by resolving the disputed factual issues in his favor. Thus, the court discounted, among other items in the presentence report, appellant's failure to report income from the sale of his house (A. 215-216), appellant's failure to disclose to the probation officer certain assets available to him (A. 216-217), appellant's failure to cooperate with a New York State grand jury after being shot in 1969 (A. 221-224), and appellant's alleged connection to narcotics (A. 221). In addition, Judge Platt ordered a new amended presentence report consistent with

his findings and requested that a new sentencing panel hear the matter (A. 226). Finally, the court noted that it was making no finding with respect to the source of the monies which appellant failed to report (A. 221).

On March 31, 1977 appellant appeared before Judge Platt and was sentenced as already noted above: three years imprisonment and a \$10,000 fine on Count Five; three years imprisonment on each of Counts Eight and Ten, with execution suspended, and \$5,000 fine on each of Counts Eight and Ten, for a total fine of \$10,000.

ARGUMENT

Appellant Was Properly Sentenced.

As noted above, appellant argues that he was improperly sentenced. He bases the claim on the contention that Judge Platt allegedly drew the inference that he (appellant) had engaged in narcotics trafficking as a corrupt detective. Appellant also argues that Judge Platt should have recused himself because of his exposure during a sentencing panel to a "tainted" pre-sentence report (Appellant's Brief, pages 9-13). We submit that appellant's contentions are totally without merit.

At the outset, it should be noted that this Court has consistently recognized that sentences are generally not reviewable. *United States v. Robin*, 545 F.2d 775, 779 (2d Cir. 1976); *rehearing en banc denied*, 553 F.2d 8 (1977); *Counts v. United States*, 527 F.2d 542 (2d Cir. 1975); *McGee v. United States*, 462 F.2d 243, 248 (2d Cir. 1972). Sentencing is a matter totally within the discretion of the trial court, and a sentence which is imposed in accordance with procedural requirements and is within statutory limits will not be disturbed, *United*

States v. Seijo, 537 F.2d 694, 700 (2d Cir. 1976), absent a showing that the sentence "was imposed on the basis of false information or false assumptions concerning the defendant," *United States v. Robin*, *supra*, 545 F.2d at 779, or evidence that the sentencing judge employed a fixed and mechanical approach rather than passing sentence on an individualized basis. *United States v. Schwarz*, 500 F.2d 1350, 1352 (2d Cir. 1974).

Here, appellant's sentences are within the statutory limits,³ and there is no assertion that the court employed a fixed or mechanical approach in sentencing. Instead, appellant's sole contention is that Judge Platt erroneously concluded that he (appellant) acquired illegally the money which he failed to report. This claim is frivolous. It is based on nothing more than appellant's speculation that the "harshness of the sentence" supports an inference that the court was sentencing on the basis of misinformation (Brief, at page 10). In the first place, as already seen, the sentence imposed was well within statutory limits.⁴ More importantly, however, it is clear from the record that there is nothing to support the claim that Judge Platt sentenced on the basis of misinformation. Not only did the judge specifically state that he was making no finding with respect to the source of appellant's money (A. 211), but he also ordered a new presentence report, convened a new sentencing panel and gave appellant the benefit of the doubt on all disputed items (A. 215-221). Furthermore, at sentencing, appellant was unable to indicate a single point of contention in the new presentence report.

³ 26 U.S.C. § 7201 provides for a maximum penalty of five years imprisonment and a fine of \$10,000, plus the costs of prosecution. The maximum penalty for a violation of 26 U.S.C. § 7206(1) is three years imprisonment and a fine of \$5,000, plus the costs of prosecution.

⁴ It is to be noted that Judge Weinstein observed that, in appellant's case, sustained serious violations of the tax law had occurred, which merited a "fairly severe sentence." (A. 42).

Equally without merit is appellant's claim that Judge Platt should have recused himself. Indeed, it is clear that merely because a judge is exposed to an inaccurate pre-sentence report he does not have to disqualify himself. *United States v. Driscoll*, 496 F.2d 252 (2d Cir. 1974); *United States v. Needles*, 472 F.2d 652 (2d Cir. 1973). Here, Judge Platt ordered an amended probation report with those inaccuracies claimed by appellant deleted and convened a new sentencing panel. And the record is devoid of any indication that Judge Platt at any time based his sentence on any misinformation. Appellant's reliance on *United States v. Robin*, *supra*, 553 F.2d 8, a case which concerns sentencing on remand after appellate review is misplaced. In *Robin*, this Court set out the factors which are to be considered in determining whether proceedings should be assigned to another judge in a case where, as here, there is no claim of judicial bias:

Absent proof of personal bias requiring recusation, Title 28 U.S.C. § 144, the principal factors considered by us in determining whether further proceedings should be conducted before a different judge are (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

553 F.2d at 10. See also *United States v. Wolfson*, — F.2d —, Slip Op. 4021 (2d Cir. June 3, 1977).

In appellant's case, Judge Platt made it clear that he was prepared to treat appellant's sentencing *de novo* and

that he had no recollection of any of the allegations made in the first presentence report nor of the recommendations of the first sentencing panel. During the sentencing proceeding appellant never once voiced opposition to any of the points raised in the presentence report amended to conform with Judge Platt's findings. In addition, Judge Platt had the benefit of the opinions of his fellow judges sitting on the new sentencing panel and having only the amended presentence report to consider. Moreover, throughout the proceedings both Judge Weinstein and Judge Platt were scrupulously fair to appellant. It is clear, therefore, that appellant has not even cleared the first test of *Robin* (that the judge could not be expected to put out of his mind previously expressed views or findings). Moreover, in an effort to accommodate appellant, Judge Weinstein recused himself in this case with the caveat that no further peremptory challenges would be allowed. Continued disqualifications of judges would not further the appearance of justice, but rather permit appellant continued judge shopping which would fly in the very face of the second test of *Robin* (preservation of the appearance of justice). Finally, it is submitted that more than enough judicial time had been consumed on this matter and that the time for sentencing had finally arrived when the case reached Judge Platt.

Appellant has been treated with the utmost fairness. He cannot now be heard to complain. His appeal is frivolous.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: Brooklyn, New York
June 30, 1977

Respectfully submitted,

DAVID TRAGER,
*United States Attorney,
Eastern District of New York.*

ALVIN SCHALL,
BARRY E. SCHULMAN,
*Assistant United States Attorneys,
Of Counsel.*

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

DOLORES M, BYRD

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 5th day of July 1977 he served a copy of the within
BRIEF FOR THE APPELLEE

by placing the same in a properly postpaid franked envelope addressed to:

SANTANGELO & SANTANGELO

253 Broadway

New York, New York

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County of Kings, City of New York.

Sworn to before me this

5th day of July 1977

Barbara A. Allen
BARBARA A. ALLEN
Notary Public, State of New York
No. 24-016621
Qualified in Kings County
Commission Expires March 30, 1979